

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division**

FILED
at 12 O'clock & 58 min P.M
Date 10/31/05
JB

United States Bankruptcy Court
Savannah, Georgia

In the matter of:

ANNA M. BUTLER

Debtor

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Chapter 13 Case

Number 05-43195

**ORDER ON AMENDED EMERGENCY
MOTION FOR EXTENSION OF AUTOMATIC STAY**

Debtor filed a Chapter 13 case on October 21, 2005. On the same day, she filed an Emergency Motion for Extension of the Automatic Stay ("Emergency Motion") and recited that: (1) this is the "second case filed within one year of dismissal of an earlier case"; (2) no automatic stay would arise as a result of new provisions of the Bankruptcy Code; and (3) a substantial change in her financial or personal affairs had occurred since the dismissal of the most recent case. The Emergency Motion requested that the court "extend" the stay provisions of 11 U.S.C. § 362 to protect the Debtor.

On October 24, 2005, she amended the Emergency Motion ("Amended Emergency Motion") and again alleged that this is the "second case filed within one year of dismissal of an earlier case," but that the automatic stay would terminate with respect to the Debtor on the thirtieth day after filing. She again requested the court to "extend" the stay provisions of Section 362 in order to protect the Debtor from all creditor actions.

Both the Emergency Motion and the Amended Emergency Motion contained the following language: "wherefore, Debtor request [sic] the court extend 11 U.S.C. § 362 and protect the debtor from all actions by the creditors without further order of court." Because of this language, the Clerk of Court sought guidance on two points. (1) In light of the allegations and the prayer for relief, did the court wish to enter an *ex parte* order imposing or extending the stay provisions of Section 362 pending a hearing? (2) If the court did not authorize the issuance of an *ex parte* order imposing or extending the stay, what minimum notice to creditors would be required prior to the setting of a hearing?

This is a matter of first impression arising under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Briefly stated, Section 362, which formerly provided for an automatic stay of most creditor actions against a debtor immediately upon the filing of a petition, has been substantially rewritten. For first-time filers, the automatic nature of the stay remains intact, although the scope of the stay has been curtailed. With respect to repeat filers, however, the new provisions have either eliminated or substantially reduced the duration of the automatic stay. Section 362(c)(3) provides generally that if a debtor refiles within one year of the dismissal of a prior case, the automatic stay "shall terminate with respect to the debtor" thirty days after the refiling. 11 U.S.C. § 362(c)(3)(A). Section 362(c)(4) provides that if a debtor refiles within one year of the dismissal of two prior cases, there is no automatic stay whatsoever and that upon request of a party in interest, "the court shall promptly enter an order confirming that no stay is in effect." 11 U.S.C. § 362(c)(4)(A)(ii).

With respect to both one-time and two-time refilers, there is an exception permitting them to demonstrate that the refiling is in good faith. Although there is a presumption that refilers have not filed in good faith, they are permitted to overcome that presumption by clear and convincing evidence. 11 U.S.C. §§ 362(c)(3)(C) and (c)(4)(D).

Because as to one-time refilers the automatic stay terminates automatically at the end of thirty days, and as to two-time refilers there is no automatic stay in effect, the first issue is whether the court may act to impose a stay upon the filing of a motion or whether relief must be sought within an adversary proceeding with pleading and evidentiary standards governed by applicable rules for injunctive relief. This requires an analysis of Section 362(c)(3)(B) and (c)(4)(B). These sections differ in their language somewhat, but the former provides that the court may extend the stay “on the *motion* of a party in interest for continuation of the automatic stay and upon notice and a hearing,” and the later provision provides that if “within thirty days . . . a party in interests *requests* the court may order the stay to take effect in the case . . . after a notice and a hearing. . . .” 11 U.S.C. §§ 362(c)(3)(B) and (c)(4)(B) (emphasis added). Although the language differs, the legal effect is the same. Section 362(d), which provides for granting relief from the automatic stay, uses the term “request” rather than “motion” and has been uniformly held to contemplate that relief may be sought by way of motion. *See* Rule 9014(a). Accordingly, the Code amendments contemplate that a motion is sufficient to trigger the relief needed.

However, both Sections 362(c)(3)(B) and 362(c)(4)(B) specify that the court

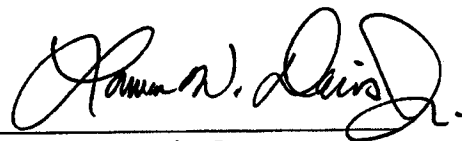
should entertain such relief only upon notice and a hearing. That being the case, I conclude that it is inappropriate for the court to issue an *ex parte* order imposing or extending the stay, without issuing a notice and conducting a hearing, or the opportunity for a hearing upon the filing of a mere motion. Should a debtor need relief in a time frame earlier than the court can reasonably notice and schedule a hearing or at least a meaningful opportunity for a hearing, I conclude that it is necessary for the debtor to seek injunctive relief under Bankruptcy Rule 7065. Rule 7065(b) provides in certain circumstances that a temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney. The requirements for seeking or obtaining such relief are quite specific, are intended to be employed only when there is a danger of immediate and irreparable injury, loss or damage, and are to be sought in such a way as to give at least minimal notice, or an explanation why actual notice to the party against whom the temporary restraining order is issued should not be required. *See* Rule 7065(b). Temporary restraining orders are of limited duration, unless extended for good cause shown or with the consent of the party against whom the order is directed, and they are subject to dissolution on as little as two days notice to the party who obtained the temporary restraining order. Id.

Notwithstanding the fact that the pleadings in this case could possibly have been construed as a request of the Court to act with limited or no notice whatsoever, the pleadings were filed in the form of an Emergency Motion; did not affirmatively seek immediate relief without further notice; were not accompanied by the affidavit or verified complaint required under Bankruptcy Rule 7065; and did not plead with specificity the nature

of the emergency nor the identity of any particular creditor whose acts had the potential of irreparable harm. Therefore, I concluded that *ex parte* relief was not appropriate and directed the Clerk to schedule a hearing on this Emergency Motion in regular fashion, and serve notice on all scheduled creditors.

The term "notice and a hearing" is defined in a flexible manner in the Code. *See* 11 U.S.C. § 102(1). The essence of the rule is that notice and a hearing or opportunity for a hearing shall be such notice as the court determines to be "appropriate in the particular circumstances." *Id.* In the context of this case, I directed that the Clerk issue a notice for a hearing on a regularly scheduled Chapter 13 hearing date, which happened to be ten days after issuance of the notice. Under the circumstances of this case and in light of the relief sought, I found ten days notice to be minimally adequate.

This Order is intended to clarify the type of relief which may be sought by motion, the time frame within which such relief will be entertained, the minimum requirements for obtaining more immediate or *ex parte* relief, and to give direction to the Clerk of Court in the scheduling of hearings in these matters.



Lamar W. Davis, Jr.
U.S. Bankruptcy Judge

Dated at Savannah, Georgia
This 31st day of October, 2005